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Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket 96-98

Dear Ms. Salas:

Covad Communications Company (Covad), by its attorney, hereby submits this *ex parte* letter to further underscore the need for the Federal Communications Commission (Commission) to adopt concrete federal unbundled network element (UNE) performance metrics, and associated penalties for noncompliance. As Covad has explained[1], the FCC's failure to have put in place concrete and enforceable UNE rules has granted incumbent LECs a free pass to hobble their wholesale "customers." The incumbents are able to claim full compliance with the Commission's unbundling rules by demonstrating that they provide UNEs – eventually – but need not provision the UNEs (or repair non-working UNEs) in any particular time frame. In the real world, a loop provisioned a week late is no different than a loop never delivered – the competitive LEC's customer will cancel service rather than stand for such a delay. Unfortunately, according to the Commission's current rules, a loop delivered in an untimely manner is no different than a loop delivered in a timely manner – all the incumbent LEC is required to do is deliver the loop at some undefined point in time. For competition to return to a landscape where competition has been all but decimated, this must change.

The Commission is well aware of the discriminatory treatment that facilities-based competitive LECs must endure in order to secure access to UNEs that the Commission's rules require incumbent LECs to provide. In the last several months, Covad has submitted several requests to the Enforcement Bureau for permission to utilize the Bureau's "accelerated docket" for rapid resolution of UNE problems that Covad has suffered at the hands of the Bell companies.[2] The Enforcement Bureau has rejected each

[1] *See* Letter dated September 4, 2001, to Magalie Roman Salas, Secretary, FCC, from Jason Oxman, Covad Communications (CC Docket No. 96-98).

[2] *See, e.g.*, Letter dated March 28, 2001, to Alexander Starr, Chief, Market Disputes Resolution Division, Enforcement Bureau, Federal Communications Commission, from Jason Oxman, Covad Communications Company (loop provisioning and pricing); Letter dated March 8, 2001, to Alexander Starr, Chief, Market

of those rocket docket requests. Covad has also asked the Enforcement Bureau to undertake its own investigation of UNE provisioning problems – to no avail.[3] Covad has also raised those same UNE issues in several long distance applications by those same Bell companies. Covad has even tried to raise the same issue in section 271 applications and with the enforcement bureau at the same time.[4] Perversely, the Commission states in each successive section 271 approval order that such issues, raised by competitive carriers, are most appropriate for an enforcement proceeding and should not be raised in the section 271 context.

What is the problem? From an enforcement perspective, the problem is that the Commission lacks concrete UNE rules to enforce. How is the Commission to tell if a loop delivered in four days violates the Act, but a loop delivered in three days does not? In the absence of a reasoned Commission rulemaking that defines such parameters, it is difficult to say. Perhaps this explains the Enforcement Bureau's reluctance to take any enforcement action in the local competition arena. The same theory applies in the section 271 process. How can the Commission tell if a four-day loop interval violated the competitive checklist, when a three-day interval may not? Again, in the absence of any Commission action to define the actual interval, it is difficult to say. Perhaps this explains the Common Carrier Bureau's unwillingness to address provisioning interval issues in section 271 orders. Whatever the reason, it is clear that all parties – incumbents, competitors, and even regulators, are unsure about what exactly section 251(c)(3) of the Act requires. Congress fully expected that the Commission would exercise its expertise and define the parameters of section 251(c)(3). That the Commission has not yet done so leaves a gaping hole in the Commission's rules.

There is no question that, given the current dearth of competition, the Commission has an immediate obligation to provide facilities-based competitors with the tools they need to secure just and reasonable UNE provisioning from incumbent LECs. Fortunately, state commissions have done much of the legwork required to develop and deploy performance metrics that impose concrete and specific obligations on the UNE provisioning practices of incumbent LECs.[5] The performance metrics developed collaboratively by Verizon and competitive LECs, under the auspices of the New York PSC, provide a useful trove of metrics that the Commission can use as the basis for federal rules. Covad highlights below the metrics from New York that make the "top

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Disputes Resolution Division, Enforcement Bureau, Federal Communications Commission, from Jason Oxman, Covad Communications Company (collocation provisioning and pricing);

[3] *See, e.g.*, Letter dated March 19, 2001 to Suzanne Tetreault, Assistant Chief, Enforcement Bureau, from Jason Oxman, Covad Communications Company (requesting enforcement action against Verizon for linesharing implementation problems that delayed linesharing availability until after the FCC's deadline);

[4] *See, e.g.*,Letter dated August 3, 2001, to Michelle Carey, Chief, Policy and Program Planning Division, CCB, FCC, and Alexander Starr, Chief, MDRD, Enforcement Bureau, FCC (CC Docket No. 01-138) (Verizon practice of requiring Covad to move equipment for migration from virtual to physical collocation in the same central office).

[5] The Commission cannot, however, continue to rely on state commissions to fulfill the federal role of ensuring nationwide compliance with the 1996 Act. The mere fact that one or two state commissions have deployed procompetitive metrics does not ensure competition will develop in the rest of the nation. The Commission has a congressionally-mandated duty to ensure that competition extends to the entire country, not just New York.

thirty" list of metrics most crucial to competition. It is essential that Commission transform these metrics into much more than just a reporting mechanism. Rather, they must form the basis for concrete and specific rules that require incumbent carriers to provision and repair UNEs in the specific time period set out in those new rules. If the carrier fails to do so, it is in violation of the Commission's rules.[6] Then, the Commission must require detailed, monthly reporting – incumbent LECs already have the mechanisms set up for such reporting, either through merger requirements or state long distance proceedings. Finally, the Commission must require automatic monthly bill credits to aggrieved carriers for the amount of penalties established by the Commission for violations of its rules.

Specific Metrics

As to each of these metrics, the Commission must ensure that incumbent LECs are required to report disagregated data – that is, data that is sufficiently separate that each competitive carrier can see reported performance as to, for example, each loop order. This will ensure accurate and verifiable reporting by the incumbent LEC.

Permissible exclusions must be defined by the Commission and strictly adhered to. The Commission has vast experience with incumbent LECs that agree to abide by certain performance requirements, but then seek to excuse themselves from compliance based on various excuses of the moment. Such actions gut the very purpose of the performance rules. The default rule must be that the Commission's performance rules are to be adhered to, unless the Commission affirmatively grants a waiver following a specific request from the incumbent carrier. In other words, actual performance must be reported, and a waiver sought after the performance is reported and the appropriate penalty has been assessed.

In the *Line Sharing Order*, the Commission cited with approval the provisioning interval adopted by the Texas PUC of 3 business days for standalone xDSL-capable loops.[7] The Commission should adopt that same interval as the nationwide standard. Similarly, the Illinois Commerce Commission recently adopted a linesharing UNE

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[6] Two other crucial ingredients must become a part of the Commission's rules. In order to ensure compliance, the Commission must punish violation of its rules. As evidenced by the recent willingness of Verizon and SBC to pay millions of dollars each month to state and federal regulators, that punishment must be severe. In addition, because of the incumbent carriers' already-established procedures for gathering and disseminating performance data, the Commission must require incumbents to provide to the Commission, and the facilities-based competitors who order and use UNEs, monthly compliance reports for each of the metrics adopted by the Commission. Those compliance reports must include all disagregated data, in order to permit reconciliation, and must also carry self-executing penalties. Those penalties should include two components: payments to the Commission, and payments to the aggrieved carrier.

[7] We note that the Texas Commission requires that the incumbent LEC provision 95 percent of xDSL orders within 3 business days (for 1-10 loops), 7 business days (11-20 loops) and 10 business days (20+ loops). In Texas, this provisioning interval runs from the application date to completion date for new, terminating, and change orders. The application date is the day that the requesting carrier authorizes the incumbent to provision the xDSL capable loop based on the loop qualification. The completion date is the day that the incumbent completes the service order activity. *See* Linesharing Order, FCC 99-355, at para. 174.

provisioning interval of one business day.[8] This one day interval, which reflects the very limited amount of work the incumbent must do to provision a linesharing order, should also be made the national standard. These intervals can be tracked pursuant to the provisioning metrics set out below.

In order to ensure UNE provisioning in a "just, reasonable" as well as "nondiscriminatory" manner[9], the Commission must adopt at minimum key metrics that incumbent LECs must utilize in reporting on performance (and money owed to competitive LECs in penalty payments). The list that follows are those baseline metrics (reference numbers are to the corresponding metrics adopted collaboratively in New York):

Provisioning

PR 2-01 (average interval completed – no dispatch).
PR 2-02 (average interval completed – dispatch).
PR 2-07 (average interval completed – DS1 loops).
PR 2-08 (average interval completed – DS3 loops).
PR 3-01 (number of orders completed in one day – linesharing UNE – no dispatch).[10]
PR 3-06 (number of orders completed in three days – xDSL-capable loops -- dispatch).[11]

PR 4-01 (% of missed appointments – ILEC caused).
PR 4-04 (% of missed appointments – ILEC caused – dispatch).
PR 4-05 (% of missed appointments – ILEC caused – no dispatch).
PR 4-14 (% complete on time – xDSL loops).

PR 5-01 (% missed appointments – ILEC facilities).
PR 5-02 (% orders held for facilities longer than 15 days).
PR 5-03 (% orders held for facilities longer than 60 days).

PR 6-01 (% trouble reports within 30 days).

PR 8-01 (% open orders in held status greater than 30 days).
PR 8-02 (% open orders in held status greater than 90 days).

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[8] Covad Communications Company Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois and for an Expedited Arbitration Award on Certain Core Issues, Docket No. 00-312, 00-0313 (Consol.), August 17, 2000 Arbitration Decision at 25-27; Illinois Bell Telephone Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service, Docket No. 00-0393, March 14, 2001 Order at 73 (requiring Ameritech Illinois to tariff in Illinois 24 hour interval for line sharing loops not requiring conditioning, and 3 days for loops requiring conditioning established in Covad/Rhythms line sharing arbitration).

[9] 47 U.S.C. § 251(c)(3).

[10] The New York PR 3-01 metric is currently used for POTS, but the federal metric would be used for linesharing to reflect the adoption of a one day interval for linesharing UNEs.

[11] As with PR 3-01, this metric in New York is not currently used for xDSL loops, but would be used as such at the federal level to reflect the three day UNE xDSL loop interval.

Maintenance and Repair

MR 2-02 (network trouble report rate – loops).
MR 2-03 (network trouble report rate – central office).
MR 3-01 (% missed repair appointments – loop).
MR 3-02 (% missed repair appointments – central office).
MR 4-01 (mean time to repair – total)
MR 4-02 (mean time to repair – loop)
MR 4-03 (mean time to repair – central office).
MR 4-07 (% out of service greater than 12 hours).
MR 5-01 (% repeat trouble reports within 30 days).

Collocation[12]

NP 2-05 (average on time, physical collocation).[13]
NP 2-07 (average delay days, physical collocation).

Billing

BL 3-01 (% billing adjustments – dollars adjusted).
BL 3-02 (% billing adjustments – number of adjustments).

Greater details on the parameters of these metrics are available in the document "New York State Carrier-to-Carrier Guidelines: Performance Standards and Reports" (July 2001), a document prepared collaboratively by Verizon, competing carriers, and the New York PSC.

Respectfully submitted,

Jason Oxman

[12] Incumbent carriers will not begin provisioning UNEs until collocation space is completed. Thus, collocation timeliness must be measured.
[13] The New York metric appears to encompass only full collocation "cages." The Commission should ensure that its rule disagreates and requires reports on collocation augment arrangements, as well as new collocation builds.

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